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Supreme Court, U.S.
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OCTOBER TERM, 1970

No. 1643

MARLON BRANDO,
Petitioner,

vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five, or in the Alternative to the California Supreme Court.

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Respondents Robert Coffman, Robert Fredericks, and Owen C. Brown, oppose Petitioner's request for issuance of a Writ of Certiorari for the reasons herein stated.

QUESTIONS PRESENTED

1. Is a State court judgment "final" for the purpose of enabling review by this court, under 28 U.S.C.

§ 1257 (3), where the judgment does not conclude the litigation between the parties on the merits of the case, but merely determines that respondents have stated triable claims, and where the trial of such claims may give rise to additional Federal Constitutional questions?

2. Is the absolute and unqualified right to speak out in *impersonal* criticism of government, as guaranteed by the First and Fourteenth Amendments applicable to petitioner's alleged statement, so as to prohibit a defamation action by persons whose official conduct is attacked in the statement?

3. Are the statements attributed to petitioner capable of being understood as concerning, and referring to, respondents under First and Fourteenth Amendment standards?

4. Does the decision of the California court that petitioner's alleged utterance is capable of bearing a defamatory meaning, so as to support a slander suit, tend to abridge petitioner's rights of free speech?

5. Do the First and Fourteenth Amendment guarantees of free speech permit a public official to bring to trial a defamation action based on defamatory remarks about his official conduct where he has pleaded "malice" by alleging the requisite state of mind (i.e. knowledge of falsity or ". . . reckless disregard for the truth or falsity of the statements made?")

ARGUMENT

A. The Judgment of the District Court of Appeal Reversing the Trial Court's Dismissal of Respondents' Action After Demurrer Should Not Be Reviewed by This Court Because It Is Not a "Final Judgment" Under 28 U.S.C. 1257 (3).

United States Code, Title 28, Section 1257 provides in part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .

It is not disputed that, inasmuch as the California Supreme Court denied petitioner's timely petition for a hearing, the District Court of Appeal's (DCA's) judgment overruling petitioner's demurrer is not subject to review in any other state proceeding. The judgment, nevertheless, fails to possess the finality required for review by this court since it is merely an intermediate step in the State court proceeding and leaves the case open for further litigation on the merits.

> *Market St. Ry. Co.* v. *Railroad Commission of the State of California*, 324 U.S. 548 (1945).

As was noted in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543 (1947), an unqualified reversal under California law is effective to remand the case to the trial court for trial on *all* issues presented by the pleadings. See also *Southern Pacific Company* v. *Gileo*, 351 U.S. 493 (1956) and 4 Cal Jur 2d § 666.

The finality rule is supported by substantial policy considerations in that it is designed to avoid the evils of fragmentary review and is recognized as an important factor in securing harmonious state-federal relations.

> *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62 (1948)

Pertinent to this case, the judgment of a state appellate court passing on the ruling of the court below on demurrer is generally not considered final.

> *Great Western Telegraph Co.* v. *Burnham*, 162 U.S. 339 (1896); *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953).

Admittedly, the concept of finality involves the accommodation of potentially divergent constitutional values and is not susceptible of mechanical application. A judgment may be considered final for the purpose of review where it concerns an issue anterior to the merits of a litigation and not related to the factual controversies of the case.

> *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *Local No. 483 Construction & General Laborer's Union* v. *Curry*, 371 U.S. 542 (1963); *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1 (1965).

Also, a state court judgment is final when it disposes of the main issues of the litigation, leaving little or no possibility that additional federal issues will arise in state proceedings.

> *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945).

Clearly, the DCA judgment leaves this case open for trial and for the possible reassertion of constitutional issues by petitioner if he believes at trial that respondents have failed to prove that the alleged utterance was understood as concerning respondents or that he acted in actual malice, etc. This case is distinguishable from *Mills* v. *State of Alabama*, 384 U.S. 214 (1966) since petitioner Brando has not conceded any of the essential facts which respondents must prove to recover damages. Also, unlike *Mills*, this case does not involve direct action by a state to abridge First and Fourteenth Amendment rights by means of criminal prosecution.

Respondents contend that they have pleaded a defamation case which is triable under federal constitutional standards. Since it appears that the merits of the case can only be determined by trial, this court should not heed petitioner's suggestion that the suit be summarily disposed of. (Petition, page 9).

B. The Challenged Statement Does Not Constitute Impersonal Criticism of Government Since It Relates to Respondents' Official Conduct; It Is Therefore Actionable by Them, If Malice Is Shown.

It is beyond dispute that the statements attributed to petitioner describe the conduct of individual police officers at a particular time and place. In their complaint, respondents plead that they were present as police officers during the events described in petitioner's remarks and that they fired their weapons at Bobby Hutton. (See Petitioner's Appendix "D", p. 24.) If these allegations are accepted as true, it follows that respondents' position is not comparable to that of the plaintiff in *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964), who was not shown at trial to have been present at the scene of, or to have directed, the criticized police conduct.

The DCA correctly read this court's decision in *New York Times* as prohibiting plaintiffs from recovering damages for defamatory attacks on governmental action "for the only reason that such plaintiffs are, by virtue of their position, legally responsible for the action criticized". (Petitioner's Exhibit "A", pp. 11-12.) As the DCA further observed, this court did not overlook the possibility that "the publication involved in *New York Times*, was not an 'impersonal attack,' but libeled Sullivan by criticizing his ability to run the police department. However, if that was the only sting of the libel, it was, of course defeated by the lack of malice." (Petitioner's Exhibit "A", p. 12.)

Petitioner's assumption that the remarks attributed to him were *on their face* merely impersonal criticism of government appears to rest on his omission to name any police officer and upon the fact that the remarks were made in a nationally televised "talk show." (Petition, p. 13.) Nonetheless, a listener might reasonably infer that he was speaking about the conduct of individual police officers who participated in the shooting of Bobby Hutton. *New York Times* v. *Sullivan, supra,* did not announce a rule which would prevent the officers concerned from recovering damages in a suit against petitioner, provided it is proven that petitioner's words were understood as referring to them and the requisite malice is shown.

C. Respondents Pleaded Facts Sufficient to Establish That the Statement Charged to Petitioner Was Made "Of and Concerning" Them Under First and Fourteenth Amendment Standards.

Although it is true that respondents alleged in their complaint that the statement charged to petitioner referred to a group of approximately 650 police officers, the DCA decided as a matter of law that the utterance could not be "of and concerning" a group of this size so as to permit recovery on the cause of action pleaded on behalf of all members of the Oakland Police Officer's Association (OPOA). (Petitioner's Exhibit A, pp. 13, 18.) It must be assumed that petitioner does not criticize this portion of the DCA decision, nor did the plaintiff adversely affected, Samson B. Mullins, seek further review in the California courts.

Regardless of such allegation, the three respondents before this court, as hereinabove discussed, also pleaded facts showing the special application of petitioner's statement to them. The DCA correctly analyzed the decision in *Golden North Airways* v. *Tanana Publishing Corp.;* 218 F. 2d 612 (9th Cir. 1954), as holding that "where a large group is libeled, individual members of that group do not have a cause of action based merely on membership." (Petitioner's Appendix A, p. 13.) On the facts of the instant case. the DCA properly determined that respondents had pleaded facts upon which a jury might find that the complained of utterance had particular reference to them as *ascertainable* members of a large group. (Petitioner's Appendix A, p. 13.)

Petitioner's suggestion that the court should review this case as an opportunity to render a definitive decision in the area of group defamation (Petition p. 15), is inappropriate because the DCA did *not* hold that a group defamation action could be maintained. Instead, consistent with petitioner's Constitutional arguments before that court, the DCA held that the OPOA could not sue as an entity, nor could its members maintain a class action. (Petitioner's Appendix A, p. 18.) The DCA also decided that respondents had pleaded facts upon which a finding could be made that petitioner's statement referred to them.

D. The Alleged Utterance Can Be Understood as Imputing a Crime to Respondents Under First and Fourteenth Amendment Standards.

The alleged utterance is not reasonably capable of bearing the innocent meaning urged by petitioner.

The utterance relates that the police were out to "get" the Panthers and that there was a "shoot-out" during which Bobby Hutton had "a gun in his hand blazing at the police". Then Hutton "was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses . . ."

The statement is devoid of any suggestion that Hutton was armed, resisting arrest, or fleeing from arrest *at the time he was shot.* Clearly, it is impossible to deduce from the words "surrender" and "hands full up" any meaning other than orderly submission to arrest. If the utterance truthfully describes the event in question Hutton was killed without justification.

Petitioner's reliance on *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6 (1970) is misplaced.

As the opinion of the DCA states:

> "The distinction between *Greenbelt* and the case at bar is too obvious to require elaborate analysis.

> "If defendant had described criminally innocuous conduct and had chosen to call it murder, he might have a point. Instead he stated facts which, reasonably interpreted, charged the individual plaintiffs with homicide." (Petitioner's Appendix "A", p. 8)

Greenbelt does establish that Federal constitutional standards must be applied by State courts in determining whether an utterance conditionally privileged under the First and Fourteenth Amendments is defamatory. The DCA decision in the instant case does not violate this principle since the defamatory import of petitioner's alleged utterance is clear.

E. Repondents' Pleading of Malice Is Sufficient Since It Meets the Definition Established by New York Times Company v. Sullivan, Supra.

Respondents allege in their complaint that petitioner's statement was made "with reckless disregard for the truth or falsity of the statement made." This is a clear and definite pleading of a state of mind which qualifies as malice so as to defeat the qualified privilege under *New York Times* v. *Sullivan*, supra.

It should be noted that this court in *Sullivan* announced a rule which prevented *recovery of damages* by public officials in State Court defamation actions, absent a showing of malice. See also, *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). The court was not specifically concerned with *methods of pleading* defamation actions in State Courts.

This court might decline to prescribe rules for pleading malice on the ground that this is a matter better left to local practice so long as local pleadings do not reflect a constitutionally impermissible definition of malice.

CONCLUSION

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Eugene E. Brott, one of the attorneys for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Brief for Respondents in Opposition as follows:

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Dated this 21st day of May, 1971.

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